STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SALINAS VALLEY FEDERATION OF TEACHERS, AFT LOCAL 1020, AFL-CIO, Charging Party, v. SALINAS UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2320-E PERB Decision No. 1639 June 14, 2004

Appearances: Law Offices of Robert J. Bezemek by Martin Fassler, Attorney, for Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO; Lozano Smith by Kristina A. Markey, Attorney, for Salinas Union High School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO (Federation) of a Board agent's dismissal (attached) of their unfair practice charge. The charge alleged that the Salinas Union High School District (District) violated the Educational Employment Relations Act (EERA) [1] by unilaterally requiring math instructors to teach during the enrichment period without bargaining over this change in the collective bargaining agreement (CBA). The Federation alleged that this conduct constituted a violation of EERA section 3543.5(a) and (c).

[1] EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

After review of the entire record, the Board adopts the Board agent's dismissal as a decision of the Board itself. We will briefly address the pertinent issues raised by the parties on appeal.

DISCUSSION

At the outset, the District claims that the Federation's charge is untimely because the enrichment period as now utilized has existed since 1995. However, we must accept the Federation's version of the facts as true. (Golden Plains Unified School District (2002) PERB Decision No. 1489; San Juan Unified School District (1977) EERB Decision No. 12[2].) The Federation alleges that the change in use of the enrichment period occurred on September 12, 2002. As the charge was filed on March 3, 2003, the charge is timely. (EERA sec. 3541.5(a)(1).) We next turn to the merits of the charge.

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Here, the Federation contends that the District is requiring teachers at Alisal High School (Alisal) to provide instruction for the first time in September 2002 during the

[2]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

enrichment period, when no instruction was required under the May 1995 CBA addendum executed by the parties. We agree with the Board agent that the issue does not involve performance of new duties, but rather an alleged increase in instructional time.

We also agree with the Board agent that under this theory, the Federation has failed to state a prima facie case of unilateral change. Although the Board views the length of the instructional day as a managerial prerogative, when such changes impact the length of the employees' workday or duty-free time, the impact is negotiable. (Imperial Unified School District (1990) PERB Decision No. 825 (Imperial) at pp. 7-8, citing San Mateo City School District (1980) PERB Decision No. 129 (fn. omitted).) The burden is on the charging party to state facts demonstrating such impact. (Imperial at p. 9, citing Modesto City Schools (1983) PERB Decision No. 291; Turlock Joint Union High School District (1996) PERB Decision No. 1151, dismissal at p. 2.)

In its appeal, the Federation acknowledges that it has not provided facts showing any impact of the September 2002 directive on the length of the workday or duty-free time. Instead, the Federation states that it did not have sufficient opportunity to provide such information during the Board agent's investigation because of confusion by the Board agent regarding the definition of the "enrichment period." As a result, in the warning letter, the Board agent viewed the enrichment period as the sixth period. In the amended charge, the Federation was able to clarify that the enrichment period was a creature of a separate agreement between the parties. The Federation also asked the Board agent to contact the Federation if it should have questions before taking further action and to allow the Federation to present additional information via written statements from Alisal teachers who had been involved with the block schedule negotiations and who have been working under that

arrangement. The appeal states that the Federation did not receive a second warning letter from the Board agent indicating the need for more evidence.

The Federation asks that the charge be remanded to the General Counsel's Office for further investigation. There is no precedent cited for taking this step. The Federation has the same access to Board precedent involving changes in instructional time as any other party coming before the Board. It is up to the Federation in its charge, to provide "a clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB Reg. 32615(a)(5).[3]). Here, the charge and the amended charge did not state the "who, what, when, where and how" of the unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S; United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) The Federation had adequate opportunity to do this. The Federation also claims that the Board agent was wrongfully asking the Federation to provide evidence, contrary to PERB Regulation 32615(a)(5). We disagree. The Board agent rightfully found that the Federation did not allege facts showing the requisite impact on the workday or duty-free time. Under these circumstances, we find it unnecessary to prolong either the investigation or the dispute in this matter by remanding the charge.

ORDER

The unfair practice charge in Case No. SF-CE-2320-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.

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[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

Dismissal Letter

July 14, 2003

Martin Fassler, Attorney
The Law Office of Robert J. Bezemek
1611 Telegraph Avenue, Suite 936
Oakland, CA 94612

Re: Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO v. Salinas Union High School District
Unfair Practice Charge No. SF-CE-2320-E; First Amended Charge
DISMISSAL LETTER

Dear Mr. Fassler:

The above-referenced unfair practice charge was filed on March 3, 2003. The Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO alleges that the Salinas Union High School District violated the Educational Employment Relations Act (EERA) at section 3543.5 by unilaterally changing the terms of the enrichment period.

I indicated to you in my attached letter dated May 12, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to May 19, 2003, the charge would be dismissed. I later granted Charging Party two extensions to file an amended charge.

On June 2, 2003, I received a letter from Martin Fassler, Charging Party's attorney addressing the deficiencies I noted in my May 12, 2003, letter. The letter, which was not served on the Respondent, specifically corrects my theory of the case and asserts that the enrichment period is separate and distinct from the advisory period specified in the parties MOU.

On June 6, 2003, Charging Party filed a first amended charge. The amended charge and original charge provide the following facts.

Salinas Valley Federation of Teachers is the exclusive bargaining representative for the District's certificated employees. The District and Federation are parties to a collective bargaining agreement which expires on June 30, 2003. With regard to work hours, Article VII.C of the Agreement provides in relevant part as follows:

> Full-time comprehensive school teachers and continuation school teachers may voluntarily agree to teach a sixth (6^{th}) period schedule, subject to the following conditions:
>
> For the 2000-2001 school year and thereafter the compensation shall be one-sixth ($1/6^{th}$) of the unit members' regular schedule salary.

Additionally, Article VII.B.2 of the Agreement provides the following regarding advisory periods:

> The staff at any comprehensive school may modify its class schedule to provide for a period during the day not to exceed twenty (20) minutes for the purposes of creating an advisory period or a period of sustained silent reading. Such schedule is subject to the following conditions:
>
> * * * * *
>
> b. No additional preparation or paper grading will be required of the teacher. All materials must be provided by the school, however, the teacher will be responsible to preview the material.
>
> c. No teacher will be expected to act in the role of counselor.

The charge concerns the enrichment period at Alisal High School. Alisal High School has approximately 69 enrichment classes; 49 regular enrichment classes and 25 dedicated enrichment classes. Dedicated enrichment classes include such classes as Leadership, Health Academy, GATE, Migrant Education and Freshman Focus. Regular enrichment classes include such academic courses as Math, Honors English, and Music, as well as non-academic classes like Football and Baseball.

Enrichment periods <u>are</u> <u>not</u> advisory periods as specified in the MOU. The term "enrichment" period is stated only in an addendum to the 1994-1995 agreement, which provides in relevant part:

> SVFT and SUHSD agree that for 94-95 to a block schedule for AHS which will consist of 3 equal in length teaching periods, one enrichment/tutorial period, and passing periods of 10 minutes. It is understood that the length of the periods and enrichment/tutorial over the year must be at least 64,800 minutes. (The periods will be either 98 or 99 minutes and the enrichment/tutorial period will be no more than 40.)

The Federation contends that prior to September 2002, teachers at Alisal were not required to provide any instruction during the enrichment periods but simply handed out District prepared assignments or supervised students in independent study. More specifically, Charging Party's June 4, 2003, letters states "this new schedule included a 40-minute 'enrichment period' which did not consist of or require or include direct subject teaching. Teachers were required to assist students in other ways." These "other ways" are not specified.

On September 6, 2002, Alisal Principal Candy McCarthy issued a memorandum to all Math teachers directing them to provide instruction during the enrichment period.

On September 12, 2002, Federation President Phil Moore wrote Ms. McCarthy a letter requesting to bargain the changes in the enrichment period responsibilities. On September 13, 2002, Ms. McCarthy responded to the request by stating the District did not have an obligation to bargain the change.

The Federation has filed a grievance over this matter. The grievance is currently at Step III of the process. However, as the grievance procedure does not culminate in binding arbitration, deferral is inappropriate.

Based on the information provided in the original and amended charges, the charge still fails to demonstrate a prima facie violation of the EERA, for the reasons provided below.

Charging Party contends that by requiring "direct instruction" during the enrichment period, the District has unilaterally changed the parties' past practice of not requiring instruction. In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Charging Party asserts that the requirement to provide instruction during the enrichment period constitutes a change in job duties. It is not clear why Charging Party believes providing instruction is a change in teacher job duties since they are, in fact, teachers. Instead, my review of the facts indicates that the charge alleges a change in the amount of instruction teachers are required to provide.

PERB case law on the change in instructional minutes provides guidance herein regarding the scope of representation. In Imperial Unified School District (1990) PERB Decision No. 825, PERB held that employers are generally free to alter the instructional schedule without prior negotiation. However, when changes in the instructional day in turn affect the length of the working day or existing duty-free time, the subject is negotiable. Moreover, to the extent

changes in preparation time affect the length of the employees' workday or existing duty-free time, that subject is negotiable.

In Imperial, the District unilaterally changed the instructional day by adding three minutes to periods two through six, for a total of fifteen additional instructional minutes. The workday minutes, however, remained unchanged. The additional instructional minutes were taken from periods before and after classes during which the teachers had previously been required to be present but were not engaged in actual student instruction. In finding such a change did not violate the EERA, the Board noted that the affect of the schedule change on teachers was vague and contradictory. Moreover, the Board found that the Association failed to show the schedule change had an impact on the length of the workday or on the existing duty-free period, specifically the lunch period.

In Corning Union High School District (1984) PERB Decision No. 399, the Board analyzed a situation in which the District unilaterally increased the instructional day by substituting a teaching period for a preparation period. After hearing testimony that such a change increased the amount of time teachers spent preparing after hours, the Board concluded that such a change was unlawful.

Herein, the enrichment/tutorial period is not a duty-free period, but instead a period where teachers are required to be present in the classroom. As such, requiring teachers to provide instruction during this period affects the instructional minutes provided by teachers. Charging Party does not allege or present any facts indicting the change has affected the teachers' preparation time or duty-free time. Thus, following the Board's decision in Imperial, the employer is not obligated to bargain over the change in instructional minutes. As such, the charge must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[1] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

[1] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON

General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: [***]

Warning Letter

May 12, 2003

Patricia Lerman, Field Representative
Salinas Valley Federation of Teachers
7949 Wren Avenue, Suite A
Gilroy, CA 95020

Re: Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO v. Salinas Union High School District
Unfair Practice Charge No. SF-CE-2320-E
WARNING LETTER

Dear Ms. Lerman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 3, 2003. The Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO alleges that the Salinas Union High School District violated the Educational Employment Relations Act (EERA)[1] by requiring teachers to provide instruction during the enrichment period.

Salinas Valley Federation of Teachers is the exclusive bargaining representative for the District's certificated employees. The District and Federation are parties to a collective bargaining agreement which expires on June 30, 2003. With regard to work hours, Article VII.C of the Agreement provides in relevant part as follows:

> Full-time comprehensive schoolteachers and continuation schoolteachers may voluntarily agree to teach a sixth (6^{th}) period schedule, subject to the following conditions:
>
> > For the 2000-2001 school year and thereafter the compensation shall be one-sixth ($1/6^{th}$) of the unit members' regular schedule salary.

This sixth period class has been termed an "enrichment" period by the parties and lasts anywhere from 20 to 40 minutes, depending upon the school site.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The charge concerns the enrichment period at Alisal High School. Alisal High School has approximately 69 enrichment classes; 49 regular enrichment classes and 25 dedicated enrichment classes. Dedicated enrichment classes include such classes as Leadership, Health Academy, GATE, Migrant Education and Freshman Focus. Regular enrichment classes include such academic courses as Math, Honors English, and Music, as well as non-academic classes like Football and Baseball.

The Federation contends that prior to September 2002, teachers at Alisal were not required to provide any instruction during the enrichment periods but simply handed out District prepared assignments or supervised students in independent study. On September 6, 2002, Alisal Principal Candy McCarthy issued a memorandum to all Math teachers directing them to provide instruction during the enrichment period.

On September 12, 2002, Federation President Phil Moore wrote Ms. McCarthy a letter requesting to bargain the changes in the enrichment period responsibilities. On September 13, 2002, Ms. McCarthy responded to the request by stating the District did not have an obligation to bargain the change.

The Federation has filed a grievance over this matter. The grievance is currently at Step III of the process. However, as the grievance procedure does not culminate in binding arbitration, deferral is inappropriate.

The above stated facts demonstrate a prima facie case of unilateral change.

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196.)

In order to prevail on a theory of transfer of job responsibilities, the charging party must demonstrate actual changes in the employee's job duties. If the changes are reasonably comprehended within the existing job duties, an assignment of such duties, even if never performed before, is not a violation. (Rio Hondo Community College District (1982) PERB Decision No. 279.)

Herein it is uncontested that Ms. McCarthy instructed teachers to provide “small group instruction/practice and individual instruction as needed.” However, providing instruction to students is entirely within the teachers job duties and as such, instructing them to do so while they are in the classroom does not unilaterally change the job duties of the teachers. As the

teachers were already paid for this time and were already in the classroom their work hours were not affected. As such, the charge fails to state a prima facie case.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 19, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR